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No. 79-1289

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM M. CHANEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1979. A petition for rehearing was denied on January 22, 1980. The petition for a writ of certiorari was filed on February 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner could be tried for a fourth time after two prior trials resulting in convictions were reversed on appeal and a third trial ended in a hung jury.

2. Whether petitioner was improperly sentenced on retrial to a longer sentence than imposed for earlier convictions that had been reversed.

3. Whether the trial court erred in instructing the jury regarding aiding and abetting when petitioner had not been indicted as an aider and abettor.

4. Whether petitioner's conviction should be reversed because he was not allowed to defer his opening statement until the close of the government's case.

5. Whether the trial court erred in admitting two prior state felony convictions to impeach petitioner's credibility.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted of attempting to damage by explosives a building used in interstate commerce, in violation of 18 U.S.C. 844(i), and of possessing an unregistered destructive device, in violation of 26 U.S.C. 5861(d). He was sentenced to five years' imprisonment on the first count to be followed by five years' probation on the second count. The court of appeals affirmed (Pet. App. A3-A8).

The evidence at trial established that in the early morning of May 11, 1976, two truck drivers saw petitioner's automobile enter the driveway of the Naegele Outdoor Advertising Company building in Indianapolis, Indiana (Tr. 449, 472). Petitioner left the car and threw a fire bomb against the rear door of the building (Tr. 472-475). A local police officer saw petitioner driving away from the scene of the fire and arrested him one block away from the building (Tr. 108-122, 208-216).

The trial below marked the fourth time petitioner has gone to trial on these charges. He was first tried and convicted in October 1976. The court of appeals reversed that conviction on the basis of an improper instruction to the jury. 559 F. 2d 1094 (1977). Petitioner was retried in November 1977 and was again convicted. This conviction was also reversed, this time on the ground that the trial court had erred in excluding certain defense evidence. 577 F. 2d 433 (1978). Petitioner's third trial ended in the declaration of a mistrial, upon petitioner's motion, after the jury was unable to reach a verdict.

ARGUMENT

1. Petitioner contends that his conviction after three previous trials is barred on both double jeopardy and due process grounds (Pet. 12-16, 37-40).

Petitioner concedes (Pet. 12) that the Double Jeopardy Clause does not prohibit a retrial after a conviction has been reversed on appeal. See *United States* v. *Ball*, 163 U.S. 662, 672 (1896). He contends (Pet. 37-40), however, that where a mistrial is declared because of the jury's inability to agree on a verdict, as in petitioner's third trial, the Double Jeopardy Clause prohibits a retrial. This contention is completely without foundation. Since *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), it has been established that a defendant may be reprosecuted if his first trial ends in a mistrial. Moreover, petitioner himself moved for the mistrial here on the basis of the jury deadlock and thus is in no position to complain that he has been denied his right to have his guilt or innocence determined before the trier of fact in the proceeding resulting in a mistrial. See *United States* v. *Dinitz*, 424 U.S. 600, 607-608 (1976).

Petitioner also contends (Pet. 12-16) that to try him for a fourth time, whatever the reasons for the inconclusive results of the first three trials, violates the Due Process Clause. This contention is without merit. Cf. *United States* v. *Dooling*, 406 F. 2d 192 (2d Cir.), cert. denied, 395 U.S. 911 (1969). Petitioner was convicted only on the charges initially brought against him, on which he had been convicted twice before. That conviction does not violate due process just as it does not violate double jeopardy. The retrial is permitted, not because of a "technicality" (Pet. 14), but because letting petitioner go free without a determination of his innocence would offend important societal interests without significantly advancing the policies of due process and double jeopardy. As the court stated in *United States* v. *Tateo*, 377 U.S. 463, 466 (1964):

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

In the present case, there were good reasons why each of the first three trials ended without a final judgment. Petitioner points to no special unfairness or governmental misconduct that necessitated four trials of the charges against him. The interests of justice dictated that each trial be held for the purpose of resolving those charges, and the circumstances of the case provide no basis for a contention that petitioner was the victim of fundamentally unfair procedures denying him due process.

2. Petitioner also contends (Pet. 21-26) that the trial judge's imposition of a sentence longer than that imposed on his earlier convictions violated the due process standards of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969).[1]

In *Pearce* this Court established that the Double Jeopardy Clause does not bar the imposition of a higher sentence on retrial. Due process would be violated, however, if the higher sentence were imposed for vindictive or retaliatory reasons. The Court concluded that a greater sentence may be imposed "in light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' " *Id.* at 723, quoting *Williams* v. *New York*, 337 U.S. 241, 245 (1949). But in order to assure the absence of improper motivation, the trial judge must place upon the record his reasons for

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[1]As previously set forth, petitioner now stands sentenced by the district court to a term of five years' imprisonment and five years' probation. This constitutes an increase in severity from both the sentence imposed after petitioner's first trial (two years' imprisonment and 18 months' probation) and the sentence imposed after his second trial (three years' imprisonment and three years' probation) (Pet. 4). Each sentence was imposed by a different district judge.

imposing the increased sentence, and those reasons must be based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726.

The trial judge in this case complied fully with the mandate of *Pearce*. He made extensive findings (Tr. 1691-1704) in explanation of the sentence and in justification of its increased severity. Petitioner had repeatedly disregarded the conditions imposed by the magistrate regarding his release on bond (Tr. 1700, 1703-1704). Petitioner had been granted the privilege of leaving the district for purposes of employment if he obtained the permission of the magistrate (Tr. 1673-1674; Disp. Tr. 13-19, 86-87).[2] However, petitioner frequently left the state for various other reasons without notifying the magistrate, including to attend and preside at Ku Klux Klan rallies (Disp. Tr. 86-88, 94). As the trial judge noted, this conduct was undertaken despite petitioner's knowledge of the "violence [that] has followed the organization" (Tr. 1703). The trial judge concluded that petitioner's actions after his prior sentencings demonstrated that he "has a disrespect for the law" (Tr. 1704). These findings satisfied the requirement of *North Carolina* v. *Pearce*, *supra*, and petitioner's violations of the conditions of his bond justified the increased sentence imposed upon him.[3]

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[2]"Disp. Tr." refers to the transcript of the initial disposition hearing held on March 23, 1979.

[3]Petitioner claims (Pet. 24) that the trial court did not rely on his violations of bond conditions as a reason for the increased sentence, citing the trial judge's statement that "I won't rely upon this for my judgment in increasing the penalty." This citation is taken out of context and misrepresents the meaning of the court's comment. Read in context, it is clear that the court relied principally on petitioner's conduct on bail to justify the increased sentence, but planned to substitute written findings for his oral findings in that regard. The court stated (Tr. 1700):

> The record now discloses, which the Court observed in informal findings which this amounts to—and I won't rely upon this for my judgment in increasing the penalty and adopting the five-year recommendation; it will be reduced to writing so that it will have the flesh on the bones of an explanation of such finding, of increasing the penalty—that the defendant had been utterly disregardive of his obligations under the law while he's under arrest.

In fact, the court did not subsequently supplant its oral findings with a formal written order.

3. Petitioner also contends (Pet. 26-30) that, because he was not specifically indicted as an aider and abettor, the trial court erred in instructing the jury that it could find him guilty if he aided and abetted the offense charged. This contention is without merit. It is well established that a defendant may be convicted as an aider and abettor even if not designated as such in the indictment. See *United States* v. *McCambridge*, 551 F. 2d 865, 871 (1st Cir. 1977), and cases cited therein. Indeed, as the court of appeals noted, the instruction was particularly appropriate here because petitioner had "defended himself on the theory that someone else committed the crime, and there was ample evidence to show that [petitioner] had a connection with the alleged offense" (Pet. App. A6).

4. Petitioner's argument (Pet. 30-36) that his conviction should be reversed because he was not allowed to defer his opening statement until the close of the government's case is similarly insubstantial. The order and format of opening statements is a matter largely within the discretion of the trial court. See *United States* v. *Freeman*, 514 F. 2d 1184, 1192 (10th Cir. 1975); *United States* v. *Conti*, 361 F. 2d 153, 158 (2d Cir. 1966), vacated

on other grounds, 390 U.S. 204 (1968). There is no evidence that that discretion was abused. Indeed, petitioner has not suggested how he was prejudiced by the trial court's ruling.[4] It was established that petitioner's counsel was prepared to state his theory of the case in advance of trial, and that theory was not altered after the presentation of the government's case (Pet. App. A7).

5. Finally, petitioner asserts (Pet. 16-21) that the trial court erred in allowing his trial testimony to be impeached by the introduction of two prior state felony convictions, for possession of a gas ejecting device and for carrying a concealed weapon.

This contention is without merit. Rule 609(a)(1) of the Federal Rules of Evidence specifically allows the use of prior felony convictions for impeachment of a witness if the court determines that their probative value outweighs their prejudicial effect. Such convictions need not involve dishonesty or false statements, which are the subject of Rule 609(a)(2). When the government sought to cross-examine petitioner at trial with regard to prior convictions, the court held a hearing and determined on the record that the standard for admission under Rule 609(a)(1) had been met as to these two convictions (Tr. 807-812, 823-832). The trial court focused on the fact that petitioner's defense rested in great part on his own testimony and that he had sought to build up his own credibility by detailing his "achievements in life" and his standing in the community as a honorable man (Tr. 831, Pet. App. A11). In light of this approach, the court

[4]Cf. *Hampton* v. *United States*, 269 A.2d 441 (D.C. 1970), cited by petitioner (Pet. 32-33), where the court held that the defendant's inability to make an opening statement did not prejudice him and affirmed his conviction.

expressly ruled that the probative value of the prior convictions outweighed their prejudicial effect. The court of appeals correctly held (Pet. App. A7-A8) that the district court properly exercised its discretion, and there is no occasion for further review of this fact-specific determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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